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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

SARASWATI SUKUMAR, Plaintiff and Appellant, v. PONANI SUKUMAR, Defendant and Respondent; SHIH-HUA ALAN LEE, Defendant and Appellant.	D050303 (Super. Ct. No. GIC782930)

APPEALS from a judgment of the Superior Court of San Diego County, Ronald L. Styn, Judge. Affirmed.

Defendant Shih-Hua Alan Lee appeals a judgment in the malicious prosecution action filed against him by plaintiff Saraswati Sukumar (Sara). On appeal, Lee contends the trial court erred by finding he did not have probable cause to file the underlying breach of contract action against her.

Sara cross-appeals, contending the trial court erred by reducing the amount of punitive damages awarded to her against Lee. She also contends the trial court erred by granting the nonsuit motion of codefendant Ponani Sukumar (Ponani), her former husband, based on its finding he had probable cause to file his cross-complaint for indemnity against her in Lee's underlying action for breach of contract.

FACTUAL AND PROCEDURAL BACKGROUND

Ponani and Sara were born in India. In 1970, they were married. In April 1978, Sara moved to the United States to begin her job as a cancer researcher in Maryland. In January 1979, Ponani and their two children joined her in the United States. Ponani began a two-year master's degree program at the Wharton School of Business and lived in Philadelphia, while Sara and their children lived in Maryland. While in graduate school, Ponani met Lee, a classmate, and they became close personal friends. After Ponani obtained his degree, he remained in Philadelphia for two more years working as a financial advisor and insurance agent. In 1982, Lee returned home to Singapore. In 1983, Ponani and Sara moved into a home they purchased in Maryland. During the following four years, Sara worked as a medical researcher and Ponani worked as a broker. Ponani also served as Lee's financial advisor.

In 1987, Sara accepted a research position with the Salk Institute in San Diego. In November 1987, Ponani and Sara moved with their children to San Diego. During the following three years, Ponani worked at various firms as a broker, but earned less money than before. In July 1991, Ponani stopped working as a broker and told Sara he would start working out of their home. However, apparently he was never able to do so.

Between 1990 and 1994, Ponani made various telephone calls to Lee requesting financial assistance.[1] Ponani wrote purportedly contemporaneous letters summarizing each telephone call and the terms of the purported loan Lee would make to him.[2] Following each request, Lee transferred money to joint account with Sara. However, Sara was unaware of Ponani's requests or Lee's money transfers.

In October 1994, Sara moved to Maryland to begin her new job with Johns Hopkins University as an associate professor and director of breast cancer research. Ponani remained in San Diego.

In February 1995, Sara filed a petition for the dissolution of her marriage to Ponani. Apparently following through on his prior threats to financially and emotionally "break" Sara if she filed for divorce, Ponani declared he had no source of income and succeeded in obtaining a court order that she pay him spousal support. Furthermore, Ponani declared the purported "loans" (i.e., the money transfers) Lee made to him were community debts. On reviewing that declaration, Sara learned about Lee's money transfers for the first time and took the position that she had no obligation to repay those

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1 Ponani's first request was made on February 2, 1990. Following periodic subsequent requests, he made his last request (as relevant to this appeal) on August 15, 1994.

2 At trial, Ponani testified that he faxed each letter to Lee.

purported debts. Ponani also submitted a letter from Lee in which Lee stated he would not be able to continue making loans to Ponani in the future.

On February 27, 1997, while the Sukumars' dissolution proceeding was ongoing, Lee filed an action against Ponani and Sara for breach of contract based on the "loans" he allegedly made to Ponani. Lee sought total damages of $1,410,805. Sara filed a cross-complaint against Lee and Ponani, alleging she had no knowledge of the purported loans and Ponani should alone be declared responsible for paying any judgment. She sought equitable indemnity from Ponani. On his attorneys' advice, Ponani filed a cross-complaint against Sara for equitable indemnity and declaratory relief.

Because Ponani agreed with Lee's claims regarding the loans, he entered into a stipulated judgment with Lee in the amount of $888,000. It provided that Ponani would pay Lee in installments and, if Lee demanded, he would transfer to Lee his interest in a Maryland property and his San Diego home. Ponani's judgment obligation would be reduced by any amounts Lee recovered from Sara in the ongoing breach of contract action.

Before trial, Ponani voluntarily dismissed his cross-complaint against Sara. On September 4, 1998, following a bench trial, the trial court issued a statement of decision rejecting Lee's claim that Sara owed him money on his purported loans. Although the court believed Lee transferred substantial amounts of money to Ponani, it concluded Lee intended those transfers to be gifts and not loans. The court found Sara's testimony to be highly credible, and found Lee's testimony inherently incredible and his claim that the transfers were intended to be loans unsupported by evidence and unbelievable.[3] The court noted Lee "had difficulty maintaining a straight face as he answered questions of the Court about his motivation in making these transfers." It noted that in applying for a line of credit, Ponani did not list any loans from Lee. Although Lee presented copies of Ponani's letters regarding the purported loan requests, they contained no fax legend showing they were faxed by Ponani and/or received by Lee. It further found Lee did not maintain any documents or other records to memorialize the purported loans. Furthermore, after Lee filed his action against Ponani and Sara, Lee transferred substantial amounts of money to Ponani's 90-year-old father without any realistic hope of recovering that money. The court concluded Lee's breach of contract action was very likely orchestrated by Ponani to gain a tactical advantage in his marital dissolution case with Sara. The court believed the evidence of loans presented by Lee (e.g., copies of Ponani's letters) "may very likely have been fabricated for trial." The court stated:

> "The terms of the alleged loans are vague and change over time. There was no collateral, and Mr. Lee has neither seriously demanded any repayment nor has he ever received even one cent in repayment since 1981. Inherent in the evidence is a donative intent. These were voluntary transfers without consideration. Civil Code [section] 1146. Accordingly, the Court finds that these cash transfers from Mr. Lee to [Ponani] are gifts and not loans."

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3 Ponani invoked his constitutional right against self-incrimination and did not testify at trial.

Accordingly, the court entered judgment for Sara.[4]

On February 8, 2002, Sara filed the instant action for malicious prosecution against Lee and Ponani.[5] On November 14, 2003, she filed her operative first amended complaint, alleging Lee maliciously filed and prosecuted his breach of contract action, and Ponani maliciously filed and prosecuted his cross-complaint for indemnity, without probable cause. She sought general, special, and punitive damages. On December 12, the trial court denied Lee's and Ponani's SLAPP motions to strike the complaint pursuant to Code of Civil Procedure section 425.16.[6]

Following the evidentiary portion of the jury trial, the trial court granted Ponani's motion for nonsuit, finding that, as a matter of law, he had probable cause to file his cross-complaint for indemnity against Sara in the underlying lawsuit for breach of contract. The court denied Lee's motion for a directed verdict, finding there were disputed issues of fact for the jury to decide before it could determine whether Lee had probable cause to file his breach of contract action against Sara. The jury answered, "Yes" to the question: "Has [Sara] proved that at the time Mr. Lee filed the original

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4 On appeal, we reversed the trial court's award of sanctions against Lee because Sara's motion for sanctions was untimely filed, but affirmed the judgment in all other respects. (*Lee v. Sukumar* (Nov. 20, 2000, D032371) [nonpub. opn.].)

5 Gary Brenner, Lee's attorney in his action against Sara, was also named as a defendant, but was later dismissed pursuant to a settlement with Sara.

6 On appeal, we affirmed the trial court's order denying the motions to strike. (*Sukumar v. Sukumar* (Nov. 16, 2004, D043538) [nonpub. opn.].)

complaint on January 10, 1997, that he knew that his claim that he loaned money to the Sukumars on or about April 8, 1991 was false[?]"[7] The jury also answered, "Yes" to that question regarding other subsequent loans purportedly made by Lee. The jury also answered, "Yes" to the question: "Has [Sara] proved that during the pendency of the lawsuit, Mr. Lee knew that his claim that he loaned money to the Sukumars on or about April 8, 1991 was false[?]"[8] The jury also answered, "Yes" to that question regarding other subsequent loans purportedly made by Lee.

The jury also returned a special verdict finding Lee brought his breach of contract action against Sara primarily for a purpose other than succeeding on the merits of the action, Sara was harmed thereby, and Lee's conduct was a substantial factor in causing her harm. The jury found Sara's economic damages (e.g., attorney fees and costs in the underlying action) were $160,000 and her noneconomic damages (e.g., mental suffering) were $800,000. The jury also found Lee acted with malice, oppression or fraud to justify an award of punitive damages. The trial court then concluded that, based on the facts found by the jury, Lee did not have probable cause to file or prosecute his breach of contract action against Sara. The court noted the jury found Lee knew his claim that he loaned money was false and, considering that finding, its ruling on probable cause was

7 That question's language was repeated in inquiring about subsequent loans purportedly made by Lee (i.e., on August 5, 1992, February 7, 1993, August 16, 1993, January 30, 1994, and March 8, 1994).

8 That question's language was repeated in inquiring about subsequent loans purportedly made by Lee (i.e., on August 5, 1992, February 7, 1993, August 16, 1993, January 30, 1994, and March 8, 1994).

compelled. After presentation of evidence in the punitive damages phase of the trial, the jury awarded Sara $5,000,000 in punitive damages against Lee. On November 13, 2006, the court entered judgment against Lee based on the jury's verdict. On December 7, 2006, the court entered a separate judgment for Ponani based on its order granting his motion for nonsuit.

On November 30, Lee filed motions for judgment notwithstanding the verdict (JNOV) and for a new trial. Lee argued he had probable cause to file his action and the amount of punitive damages awarded by the jury was excessive. The trial court denied the motion for a new trial and granted the JNOV motion in part, reducing the amount of the punitive damages to $1,454,000, and denied that motion in all other respects. The court stated:

> "Mr. Lee argues that the Court abdicated its duty [to decide the issue of probable cause] by relying on the jury's findings. The jury specifically found that Lee knew his claim for each loan was false when he filed the Complaint and knew that his claim for each loan was false during the pendency of the lawsuit. Since Lee was the so-called lender, his knowledge would be paramount. If Lee knew the claims were false, then there could not be any probable cause for filing a suit to collect on loans.
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> "Nevertheless, [Lee] urges the Court to make an independent inquiry. The Court has done so. The Court finds the testimony of Mr. Lee not credible. . . . The Court has not gone into all the instances of Mr. Lee's unbelievable testimony, such as his testimony regarding why he had a hand puppet at the deposition. . . . [T]he testimony of Mr. Lee simply is not credible. In the view of the Court, there was never an intent to make a loan, and at the time the lawsuit was filed and through the pendency of the lawsuit, there was no enforceable loan and Mr. Lee was well aware there was no

> enforceable loan. Therefore, there was no probable cause to file the suit."[9]

On February 23, 2007, the trial court entered an amended judgment on the jury verdict, which was basically the same as the original judgment except for the court's reduction in the punitive damages awarded from $5,000,000 to $1,454,000.

Lee timely filed a notice of appeal challenging the judgment against him. Sara timely filed a notice of cross-appeal also challenging that judgment. She also timely filed a notice of appeal challenging the judgment for Ponani after the trial court's order granting his motion for nonsuit.

LEE'S APPEAL

I

Malicious Prosecution Actions Generally

To prevail on a malicious prosecution cause of action, the plaintiff must prove that the prior action: (1) was commenced by or at the defendant's direction and was terminated in the plaintiff's favor; (2) was brought without probable cause; and (3) was initiated with malice. (*Sierra Club Foundation v. Graham* (1999) 72 Cal.App.4th 1135, 1147 (*Sierra Club*); *Sangster v. Paetkau* (1998) 68 Cal.App.4th 151, 163; *Crowley v. Katleman* (1994) 8 Cal.4th 666, 676; *Sheldon Appel Co. v. Albert & Oliker* (1989) 47 Cal.3d 863, 871 (*Sheldon Appel*); *Bertero v. National General Corp.* (1974) 13 Cal.3d

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9 The trial court's reference to the hand puppet apparently was based on the testimony of three attorneys who described how Lee wore a panda bear hand puppet during his deposition in his breach of contact action and occasionally spoke through it. That conduct does not usually enhance one's credibility.

43, 50.) "[T]he existence or absence of probable cause has traditionally been viewed as a question of law to be determined by the court, rather than a question of fact for the jury."[10] (*Sheldon Appel*, *supra*, 47 Cal.3d at p. 875.) "The probable cause element of a malicious prosecution action requires an objective determination of the 'reasonableness' of the defendant's prior lawsuit, i.e., whether, on the basis of the facts known to the defendant, the institution of the prior action was legally tenable. [Citation.]" (*Leonardini v. Shell Oil Co.* (1989) 216 Cal.App.3d 547, 567.) "Under this [objective] standard a claim is not lacking in probable cause if any reasonable attorney would have thought the claim tenable. [Citations.]" (*Id*. at pp. 568-569.) "A litigant will lack probable cause for his action if he relies upon facts which he has no reasonable cause to believe to be true, or seeks recovery upon a legal theory which is untenable under the facts known to him." (*Id*. at p. 568.) A defendant's subjective belief is relevant to the probable cause issue to the extent it relates "to the defendant's belief in, or knowledge of, *a given state of facts*, and not to the defendant's belief in, or evaluation of, *the legal merits of the claim*." (*Sheldon Appel*, at p. 879.)

Alternatively stated, a court's objective determination regarding the existence or absence of probable cause may depend on the defendant's knowledge of facts on which his or her claim is based, although the defendant's subjective belief regarding the legal tenability or legal merits of his or her claim is irrelevant to a probable cause

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10 In contrast, the existence of malice is a question of fact for the jury to decide. (*Sheldon Appel*, *supra*, 47 Cal.3d at p. 874.)

determination. (*Sheldon Appel, supra,* 47 Cal.3d at pp. 880-881.) "When there is a dispute as to the state of the defendant's knowledge and the existence of probable cause turns on resolution of that dispute, . . . the jury must resolve the threshold question of the defendant's factual knowledge or belief. Thus, when . . . there is evidence that the defendant may have known that the factual allegations on which his action depended were untrue, the jury must determine what facts the defendant knew before the trial court can determine the legal question whether such facts constituted probable cause to institute the challenged proceeding." (*Id*. at p. 881.)

Sierra Club stated:

> "[A]bsence of probable cause can be shown by proof that the initiator commenced the prior action knowing that his or her claims were false. [Citation.] Reconciling [*Bertero v. National General Corp., supra*, 13 Cal.3d 43] with the objective test for probable cause, the court in *Sheldon Appel* highlights the distinction between a defendant's subjective belief in the legal tenability of a claim, as opposed to his or her disbelief in its factual predicates. [Citation.] Probable cause does not depend on the defendant's subjective evaluation of the legal merits of the prior action. But if defendant *knows* that the facts he or she is asserting are not true, then defendant's knowledge of facts which would justify initiating suit is zero, and probable cause is nonexistent. 'A litigant will lack probable cause for his action either if he relies upon facts which he has no reasonable cause to believe to be true, or if he seeks recovery upon a legal theory which is untenable under the facts known to him.' [Citation.]" (*Sierra Club*, *supra*, 72 Cal.App.4th at pp. 1153-1154.)

Sierra Club concluded: "The question of probable cause is one of law, but if there is a dispute concerning the defendant's knowledge of facts on which his or her claim is based, the jury must resolve that threshold question. It is then for the court to decide whether the state of defendant's knowledge constitutes an absence of probable cause. [Citations.]" (*Sierra Club, supra*, 72 Cal.App.4th at p. 1154.) On appeal, we review de novo the question of law whether probable cause existed for the defendant to initiate and prosecute the underlying action. (*Sheldon Appel, supra*, 47 Cal.3d at pp. 884-885.)

II

No Probable Cause for Lee to File His Breach of Contract Action

Lee contends the trial court erred by concluding that, based on the jury's answers to questions, he did not have probable cause to file and prosecute his breach of contract cause of action against Sara. He argues that, based on undisputed facts, he had probable cause to file his action against her. Lee notes it was undisputed Ponani wrote letters requesting loans from him and that in each instance he transferred money to Ponani. By denying the existence of those loans during her marriage dissolution proceeding, Lee argues Sara repudiated her obligation to pay those loans. Based on those facts, Lee argues he objectively had tenable grounds to file and prosecute his breach of contract action against her.

A

As Lee notes, the formation of a contract (e.g., a loan contract) requires objective and outward manifestations of mutual assent, or consent, by the parties to the terms of the contract--typically by means of an offer communicated to the offeree and an acceptance communicated to the offeror. (Civ. Code, §§ 1550, 1565; *Stewart v. Preston Pipeline Inc.* (2005) 134 Cal.App.4th 1565, 1587; *Lopez v. Charles Schwab & Co., Inc.* (2004)

118 Cal.App.4th 1224, 1230; *Roth v. Malson* (1998) 67 Cal.App.4th 552, 557; *Weddington Productions, Inc. v. Flick* (1998) 60 Cal.App.4th 793, 811; 1 Witkin, Summary of Cal. Law (10th ed. 2005) Contracts, § 117, p. 156.) A party's assent or consent may be manifested by words or other conduct. (1 Witkin, *supra*, Contracts, § 117, pp. 156-157.) A party's subjective or unexpressed intent to enter into a contract is irrelevant to the determination whether a contract is formed. (*Roth*, at p. 557.) Rather, the existence of mutual assent is determined by objective, not subjective, criteria. (*T. M. Cobb Co. v. Superior Court* (1984) 36 Cal.3d 273, 282.) The test is " 'what the outward manifestations of consent would lead a reasonable person to believe. [Citation.]' " (*Ibid*.)

In objectively determining whether the parties' outward manifestations showed their intent to form a contract, a jury or court may consider the circumstances surrounding those manifestations. (*California Food Service Corp. v. Great American Ins. Co.* (1982) 130 Cal.App.3d 892, 897; CACI No. 302 ["When you examine whether the parties agreed to the terms of the contract, ask yourself if, under the circumstances, a reasonable person would conclude, from the words and conduct of each party, that there was an agreement. . . ."]; CACI No. 305 ["In deciding whether a contract was created, you should consider the conduct and relationship of the parties as well as all the circumstances of the case."]; cf. *Banner Entertainment, Inc. v. Superior Court* (1998) 62 Cal.App.4th 348, 358 ["Whether it was the parties' mutual intention that their oral agreement to the terms contained in a proposed written agreement should be binding immediately is to be determined from the surrounding facts and circumstances of a particular case and is a question of fact for the trial court."]; 1 Witkin, *supra*, Contracts, § 127, p. 166 ["In applying the test, it is necessary to consider the circumstances under which the manifestations occur."].) Therefore, "[t]he circumstances under which the writing is executed may show no contract was intended. [Citations.]" (*County of San Diego v. Viloria* (1969) 276 Cal.App.2d 350, 354.) *Fowler v. Security-First Nat. Bank* (1956) 146 Cal.App.2d 37 stated:

> "[T]he same interchange of words may or may not be a binding contract depending upon the circumstances under which the words are uttered, the tone of voice used, to whom they are addressed. *If words are spoken under circumstances where it is obvious that neither party would be entitled to believe that the other intended a contract to result, there is no contract*. As lucidly pointed out by Justice Learned Hand, 'the form of utterance chosen is never final; it is always possible to show that the parties did not intend to perform what they said they would, as, for example, that the transaction was a joke . . . or that it arose in relations between the members of a family which forbade it. . . . It is quite true that contracts depend upon the meaning which the law imputes to the utterances, not upon what the parties actually intended; but in ascertaining what meaning to impute, the circumstances in which the words are used is always relevant and usually indispensable.' [Citation.]" (*Id*. at p. 47, italics added.)

For example, "[p]roposals obviously made in jest, invitations to purely social engagements, or remarks made in the course of family discussions, which a reasonable person would not be justified in treating as offers to enter into contracts, do not, upon acceptance, give rise to binding agreements. [Citations.]" (1 Witkin, *supra*, Contracts, § 127, p. 166.) Similarly, "[p]arties to what would otherwise be a bargain and a contract sometimes agree that their legal relations are not to be affected. . . . [This] may mean that no bargain has been reached, or that a particular manifestation of intention is not a promise . . . ." (Rest.2d Contracts, § 21, com. b, p. 63.) Also, "[a] purported contract may be a sham . . . and not intended to bind the ostensibly contracting parties. [Citation.]" (1 Witkin, *supra*, Contracts, § 129, p. 168, citing *P. A. Smith Co. v. Muller* (1927) 201 Cal. 219, 224.)

B

The jury found Sara proved that Lee knew, at the time he filed and during the pendency of his action, his claims regarding the purported loans to the Sukumars were false. The trial court then concluded that, based on the facts found by the jury, Lee did not have probable cause to file or prosecute his breach of contract action against Sara. The court noted the jury found Lee knew his claim that he loaned money was false and, in light of that finding, its ruling on probable cause was compelled.

We conclude the trial court correctly found that, based on the jury's findings of fact, Lee did not have probable cause for his breach of contract action against Sara at the time he filed and prosecuted it. The jury found Lee knew his claim that he loaned money to the Sukumars was false at the time he filed and prosecuted his action. Making all presumptions to support the judgment and making reasonable inferences from that finding, we infer from the jury's express findings that it impliedly found Lee knew he did not enter into loan contracts with Ponani based on the objective surrounding circumstances in this case. The jury could have found that a reasonable person, considering the circumstances surrounding this case, would necessarily conclude Lee and Ponani never intended to enter into binding loan contracts and Lee knew the circumstances surrounding the purported loans could not support a finding that they intended to enter into binding loan contracts. The surrounding circumstances the jury may have considered included the close relationship between Lee and Ponani, Ponani's lack of income or other ability to repay the purported loans, Lee's subsequent transfers of additional money to Ponani even though he had not made any repayments on the purported loans, and Lee's failure to keep Ponani's letters or other records regarding the purported loans.

Therefore, the jury could conclude any reasonable person would find the surrounding circumstances showed Lee and Ponani considered Lee's transfers to be gifts and they did not intend to enter into binding loan contracts, despite Ponani's letters to the contrary, and Lee knew those surrounding circumstances could not support a finding that there were binding loan contracts. (Rest.2d Contracts, § 21, com. b, p. 63.) The jury could have concluded any reasonable person would find Ponani's letters were a sham and were not intended to bind Lee and Ponani, and Lee knew that to be the case at the time he filed and prosecuted his breach of contract action against Sara. (1 Witkin, *supra*, Contracts, § 129, p. 168; *P. A. Smith Co. v. Muller*, *supra*, 201 Cal. at p. 224.)

Furthermore, it is possible the jury concluded from the surrounding circumstances that Lee never actually received Ponani's letters, despite Ponani's claim he contemporaneously faxed those letters to Lee and Lee's claim he received them before transferring money to Ponani. The jury (as well as the trial court) did not find either Lee or Ponani to be a credible witness. Also, Ponani's letters did not bear any legend or other evidence they had been faxed to Lee. Therefore, the jury could conclude Lee's and Ponani's testimonies were incredible and the letters had not, in fact, been faxed to Lee prior to his transfers of money to Ponani. Furthermore, the jury could conclude that any reasonable person considering the circumstances surrounding this case would find the letters had not, in fact, been contemporaneously faxed by Ponani to Lee and Lee knew that. Absent Lee's receipt of Ponani's letters, the jury could conclude no reasonable person would find Lee and Ponani entered into binding loan contracts and Lee knew that to be the case at the time he filed and prosecuted his breach of contract action against Sara.

Based on the above factual findings by the jury, the trial court correctly concluded, as a matter of law, Lee did not have probable cause to file and prosecute his breach of contract action against Sara. The jury made the threshold factual findings regarding Lee's knowledge at the time he filed and prosecuted his action against Sara. Based thereon, the trial court concluded Lee did not have probable cause to file his action against her. Absence of probable cause could be shown by proof that Lee commenced his action against Sara knowing his claim was false, i.e., he did not believe the factual predicates of his claim. (*Sierra Club*, *supra*, 72 Cal.App.4th at pp. 1153-1154.) If Lee knew the facts he asserted were not true, then his knowledge of facts to justify his filing and prosecution of his action "is zero, and probable cause is nonexistent. 'A litigant will lack probable cause for his action either if he relies upon facts which he has no reasonable cause to believe to be true, or if he seeks recovery upon a legal theory which is untenable under the facts known to him.' [Citation.]" (*Ibid*.) In the circumstances of this case, the jury impliedly found Lee knew the predicate facts he asserted in his action were not true and therefore expressly found he knew his loan contract claims were false at the time he filed and prosecuted his action against Sara. Because of the facts Lee knew during those times, the trial court correctly concluded his breach of contract action against Sara was legally untenable based on the facts known to him at the time he filed and prosecuted that action.[11] Based on those known facts, no reasonable attorney would have thought Lee's breach of contract action against Sara was legally tenable. (*Leonardini v. Shell Oil Co.*, *supra*, 216 Cal.App.3d at p. 568.)

Neither the jury nor the trial court made any finding regarding, or considered, Lee's subjective evaluation of the legal merits of his action against Sara. As noted above, a defendant's subjective belief regarding the legal tenability or legal merits of his or her claim is irrelevant to a probable cause determination. (*Sheldon Appel*, *supra*, 47 Cal.3d at pp. 880-881.) However, by finding Lee knew, at the time he filed and during the pendency of his action, his claims regarding the purported loans to the Sukumars were false, the jury did *not* make any finding regarding Lee's *subjective* belief regarding the legal tenability or legal merits of his breach of contract action against Sara. Rather, the

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11 Subsequently, in denying Lee's motion for new trial and granting in part his JNOV motion, the trial court noted, "[i]n the view of the Court, there was never an intent to make a loan, and at the time the lawsuit was filed and through the pendency of the lawsuit, there was no enforceable loan and Mr. Lee was well aware there was no enforceable loan. Therefore, there was no probable cause to file the suit."

jury in effect found Lee knew the *factual predicates* for his action were false.[12] Based on that finding, the trial court correctly concluded Lee did not have probable cause to file and prosecute his breach of contract action against Sara.

Lee apparently argues the trial court should have considered only his knowledge of Ponani's letters and his transfers of money to Ponani in determining whether he had probable cause to file and prosecute his action against Sara. However, in so arguing, Lee ignores the circumstances surrounding this case that should also be considered in determining whether he and Ponani manifested their intent to enter into binding loan contracts. As noted above, a jury or court should consider the circumstances surrounding a purported contract in determining whether the parties manifested their intent to enter into a contract. (*California Food Service Corp. v. Great American Ins. Co., supra*, 130 Cal.App.3d at p. 897; CACI No. 302; CACI No. 305 ["In deciding whether a contract was created, you should consider the conduct and relationship of the parties as well as all the circumstances of the case."]; *Banner Entertainment, Inc. v. Superior Court*, *supra*, 62 Cal.App.4th at p. 358; 1 Witkin, *supra*, Contracts, § 127, p. 166.) Based on the close relationship between Lee and Ponani and their conduct surrounding Lee's transfers of money to Ponani, we conclude the jury properly considered those circumstances in finding Lee knew his loan claims were false at the time he filed and prosecuted his action

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12 Although, based on the language of the questions answered by the jury, it could be *argued* the jury also addressed Lee's subjective belief in the merits of his claim, we make all presumptions and intendments in favor of supporting the judgment and, accordingly, conclude the jury answered only the question regarding Lee's knowledge regarding the factual predicates for his breach of contract action.

against Sara and the court correctly concluded that, based on the jury's findings, Lee did not have probable cause to file his action against Sara.[13]

SARA'S CROSS-APPEAL

I

Punitive Damages

In her cross-appeal, Sara contends the trial court erred by granting in part Lee's JNOV motion by reducing the amount of punitive damages awarded to her against Lee from $5,000,000 to $1,454,000. She argues the court erred by concluding the amount of punitive damages awarded could not exceed 10 percent of Lee's net worth.

A

During the punitive damages phase of the trial, Lee testified that his net worth was $13,800,000. On further questioning, he admitted he also owned interests in Baltimore apartments worth $200,000, an apartment in Singapore (on which he owed more money than its value), the $888,000 stipulated judgment against Ponani, and the right to acquire Ponani's San Diego home (which apparently was worth between $1,000,000 and $1,250,000). The jury awarded Sara $5,000,000 in punitive damages against Lee.

In granting in part Lee's JNOV motion and reducing the amount of punitive damages from $5,000,000 to $1,454,000, the trial court stated:

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13 Likewise, we are not persuaded by Lee's argument that, based on his knowledge of Ponani's letters and his payment of money to Ponani, he had probable cause for his unjust enrichment cause of action against Sara.

"[Lee] argues that the $5 million in punitive damages is nearly one-third of [his] net worth. In California, courts usually limit punitive damages when they are excessive based on the [defendant's] net worth. In this case, it is very difficult to determine Mr. Lee's actual net worth. He was evasive during his testimony regarding net worth. He attempted to minimize his assets and left some of his assets out. This case contains a factor that does not exist in any of the other punitive damages cases the Court has reviewed. During the pendency of this case, Mr. Lee gave over $6 million to [Ponani] and his father. Obviously, Mr. Lee can afford to do this and the fact of this further 'gift' or 'loan' (if it was a loan, it is uncollectible) gives rise to the inference that Mr. Lee's net worth is substantially higher. Otherwise, the Court and the jury would have to believe that Mr. Lee gave away over one-third of his net worth ($6.7 million + $15.5 million = $22.2 million). Therefore, Mr. Lee could easily afford to lose $6.7 million and should be able to afford to lose another $5.6 million in this case. That would still leave Mr. Lee with approximately $10 million based on his calculations.

"Another way of looking at his net worth would be to add a receivable of $6.7 million from the Sukumars. If Mr. Lee was truly making a loan to them and hoped to collect that, his net worth would be over $20 million and the punitive damage award would be less than 25% of his net worth.

"Nevertheless, given the highest value to which Mr. Lee actually testified, his net worth would only be approximately $15.5 million. Even though the jury was entitled to not believe Mr. Lee's testimony, there is no other evidence of net worth. [Citation.] The $5 million award is over one-third of his net worth, particularly after subtracting the $960,000 [general damages] award given [to Sara] in this case. The court is going to reduce the net worth by the amount of the general damages of $960,000.00. This leaves a net worth of $14,540,000.

"California courts usually find punitive damages in excess of ten percent of a defendant's net worth to be excessive. See *Devlin v. Kearny Mesa* [*AMC/Jeep/Renault, Inc.*] (1984) 155 Cal.App.3d 381, and cases collected in the appendix.

"The court has re-reviewed *Devlin* and *Vallbona v. Springer* (1996) 43 Cal.App.4th 1525. Both cases are distinguishable on their facts.

> In *Vallbona* the defendants profited from their activities by amounts in excess of the punitive damages and in *Devlin* the defendant was a going business with substantial profits and borrowing power.
>
> "The court concludes that under the facts of this case, ten percent of defendant's net worth would be the constitutional maximum. Therefore, the court grants a partial JNOV [citation] reducing the punitive damages to $1,454,000."

The court then entered an amended judgment reflecting its reduction in the amount of punitive damages to $1,454,000.

B

The purpose of a punitive damages award is to punish wrongdoers and thereby deter the commission of wrongful acts. (*Neal v. Farmers Ins. Exchange* (1978) 21 Cal.3d 910, 928, fn. 13.) "An award should be no larger than the amount necessary to accomplish this purpose and therefore must be tailored to the defendant's financial status. [Citation.]" (*Michelson v. Hamada* (1994) 29 Cal.App.4th 1566, 1593.) "[A]n appellate court may reverse such an award 'only " '[w]hen the award as a matter of law appears excessive, or where the recovery is so grossly disproportionate as to raise a presumption that it is the result of passion or prejudice. ' " ' [Citation.]" (*Neal*, *supra*, at p. 928.) In determining whether a punitive damages award is excessive as a matter of law, a court considers three criteria: (1) the nature or reprehensibility of the defendant's conduct; (2) the ratio of punitive damages to compensatory damages; and (3) the defendant's wealth or financial condition. (*Ibid*.; *Adams v. Murakami* (1991) 54 Cal.3d 105, 110.) "[T]he most important question is whether the amount of the punitive damages award will have deterrent effect--without being excessive. Even if an award is entirely reasonable in light of the other two factors . . . , the award can be so disproportionate to the defendant's ability to pay that the award is excessive *for that reason alone*." (*Adams*, at p. 111.)

California courts have recognized that the amount of a punitive damages award *generally* cannot, as a matter of law, exceed 10 percent of a defendant's net worth without being excessive. (*Michelson v. Hamada, supra*, 29 Cal.App.4th at p. 1596; *Boeken v. Philip Morris, Inc*. (2005) 127 Cal.App.4th 1640, 1697; *Sierra Club, supra,* 72 Cal.App.4th at p. 1163; *Weeks v. Baker & McKenzie* (1998) 63 Cal.App.4th 1128, 1166; *Storage Services v. Oosterbaan* (1989) 214 Cal.App.3d 498, 515; *Seeley v. Seymour* (1987) 190 Cal.App.3d 844, 869; *Goshgarian v. George* (1984) 161 Cal.App.3d 1214, 1228.) Although, as Sara notes, some courts have allowed awards of punitive damages in excess of that limit, those cases involved exceptional circumstances and the amounts of punitive damages awarded (e.g., $80,000 and $200,000) were deemed necessary to punish and deter. (*Devlin v. Kearny Mesa AMC/Jeep/Renault, Inc. supra,* 155 Cal.App.3d 381 [$80,000 award was 17.5 percent of defendant's net worth]; *Vallbona v. Springer, supra,* 43 Cal.App.4th 1525 [$200,000 award was 23.1 percent of defendant's net worth and less than the $300,000 in profits that defendant earned from fraudulent scheme].)

"In California, a trial court reviews a motion challenging the excessiveness of an award of punitive damages similar to other motions for new trial, as a 'thirteenth juror': 'The trial court is in a far better position than an appellate court to determine whether a damage award was influenced by "passion or prejudice." (Code Civ. Proc., § 657.) In reviewing that issue, moreover, the trial court is vested with the power, denied to us, to weigh the evidence and resolve issues of credibility. [Citation.]' [Citation.] We review the trial court's determination for an abuse of discretion. [Citation.]" (*Boeken v. Philip Morris*, *Inc.*, *supra*, 127 Cal.App.4th at p. 1689.)

C

Sara argues the trial court erred by reducing the jury's award of punitive damages because it did not consider Lee's ability to pay other than his net worth. She argues the court ignored the $2,250,000 in annual dividend income he received or other factors that showed his ability to pay (e.g., Lee's subsequent transfers of $6.7 million to Ponani and/or his father). Although the California Supreme Court has declined to establish "any rigid standard for measuring a defendant's ability to pay" (*Adams v. Murakami*, 54 Cal.3d at p. 116, fn. 7), California courts have nevertheless adopted a general rule, as noted above, that punitive damage awards may not exceed 10 percent of a defendant's *net worth* (in contrast to other measures of ability to pay). Also, a defendant's net worth is an accepted measure of a defendant's ability to pay punitive damages. (See, e.g., *Kenly v. Ukegawa* (1993) 16 Cal.App.4th 49, 57-58.) Accordingly, in applying that general rule to the circumstances in this case, the trial court did not err by focusing only on Lee's net worth rather than other measures of his ability to pay. The cases cited by Sara are factually inapposite and do not persuade us to conclude otherwise. (*Zaxis Wireless Communications, Inc. v. Motor Sound Corp.* (2001) 89 Cal.App.4th 577, 582-583 [defendant's negative net worth was due primarily to accumulated depreciation and a note to its sole shareholder, while it had annual sales exceeding $250,000,000, cash of $19,000,000, and a $50,000,000 line of credit, evidencing its ability to pay punitive damages award of $300,000]; *Rufo v. Simpson* (2001) 86 Cal.App.4th 573, 579, 621, 623-624 [reprehensibility of defendant's conduct (i.e., two deliberate, vicious murders) provided exceptional circumstances].) In any event, Sara does not persuade us Lee's net worth was an inadequate measure of his ability to pay punitive damages in the circumstances of this case.

Sara also argues the trial court should have viewed with suspicion Lee's testimony regarding his net worth. However, even had the court viewed with suspicion Lee's testimony regarding his net worth, Sara did not carry her burden to prove Lee had a substantially greater net worth than the amount (i.e., $14,540,000) calculated by the trial court based on Lee's testimony and other evidence before it. Assuming arguendo Lee's testimony regarding his net worth was not credible, Sara did not present evidence showing he had a substantially greater net worth than the amount calculated by the court. In fact, the court expressly noted Lee was evasive regarding his net worth and it was "very difficult to determine Mr. Lee's actual net worth." Nevertheless, based on the evidence before it, the court increased Lee's net worth from the amount he initially stated (i.e., $13,800,000) to $15,500,000 based on additional net worth reflected by additional property interests he held and the $888,000 judgment he obtained against Ponani. The court then reduced that amount by $960,000 for the general damages Sara obtained, resulting in a final net worth of $14,540,000. Although there was evidence that could have supported an inference Lee had a greater net worth, there was no specific evidence showing he had a particular greater net worth than calculated by the trial court. As the trial court stated, "there is no other evidence of [Lee's] net worth." It was Sara's burden to prove Lee had a greater net worth, but she failed to carry that burden. (*Kelly v. Haag* (2006) 145 Cal.App.4th 910, 916.) Accordingly, Sara has not carried her burden on appeal to show the trial court erred in calculating Lee's net worth to be $14,540,000.

Sara also argues the trial court erred by applying the general rule that punitive damages should not exceed 10 percent of a defendant's net worth. Although Sara correctly notes there is no rigid limitation on punitive damages based on a defendant's net worth, she does not persuade us this is an exceptional case in which the general 10 percent limitation should not apply. The cases cited by Sara, *Devlin* and *Vallbona*, are factually inapposite and do not persuade us to conclude otherwise. Furthermore, she does not persuade us that a punitive damages award of $1,454,000 is insufficient, as a matter of law, to punish Lee and deter him and others from future wrongful conduct. Finally, Sara argues the general 10 percent limitation should not apply because the reprehensibility of Lee's conduct justifies a greater award of punitive damages. As noted above, the nature or reprehensibility of the defendant's conduct is one of the factors to consider in determining whether a punitive damages award is excessive as a matter of law. (*Neal v. Farmers Ins. Exchange*, *supra*, 21 Cal.3d at p. 928; *Adams v. Murakami*, *supra*, 54 Cal.3d at p. 110.) Sara argues Lee's conduct was reprehensible because he: (1) preyed on her (a person who was financially weak) with the intent to financially break her by filing and prosecuting his breach of contract action; and (2) used trickery or deceit by lying throughout both his action and her instant malicious prosecution action. However, Sara does not cite any apposite case showing, or otherwise persuade us, such conduct is so reprehensible that the general rule limiting punitive damages to 10 percent of a defendant's net worth should not apply. In any event, as the California Supreme Court stated, a punitive damages "award can be so disproportionate to the defendant's ability to pay that the award is excessive *for that reason alone*" regardless of the reprehensibility of the defendant's conduct. (*Adams v. Murakami*, *supra*, 54 Cal.3d at p. 111.) Sara does not show the trial court erred by reducing the amount of punitive damages awarded from $5,000,000 to $1,454,000.[14]

IV

Nonsuit for Ponani

Sara contends the trial court erred by granting Ponani's motion for nonsuit based on its finding he had probable cause to file his cross-complaint for indemnity against her in Lee's action against Sara and him for breach of contract.

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14 Although Sara argues the award of punitive damages in this case did not violate federal constitutional limitations on the ratio of punitive to compensatory damages (see, e.g., *State Farm Mut. Automobile Ins. Co. v. Campbell* (2003) 538 U.S. 408), we need not address that issue because the trial court found no such violation and, instead, based its reduction in the amount of punitive damages on California law. Because we uphold the court's reduction in punitive damages based on California law, we need not address Lee's alternative argument that the federal constitutional limitation would also have supported such reduction.

A

Ponani's cross-complaint against Sara for indemnity and declaratory relief alleged:

> "1. [Ponani] has been a resident of San Diego County, California since November, 1987.
>
> "2. [Ponani] is informed and believes and thereon alleges that [Sara] was a resident of San Diego County, California from November 1987 to February 26, 1995 (date of separation pursuant to date of service of Petition to Dissolve Marriage on [Ponani]).
>
> "3. [Lee's] prior and current residency is [Singapore address].
>
> "4. On or about March 21, 1997, [Ponani] was served with a complaint ('the Complaint') filed by [Lee].
>
> "5. The Complaint alleges that between December 3, 1981 and March 8, 1994, Lee made personal loans in excess of $600,000 to [Ponani] and [Sara].
>
> "6. The Complaint further alleges that at all times between December 3, 1981 and March 8, 1994, [Ponani] and [Sara] were the agents of each other, and were at all times acting within the course and scope of that agency.
>
> "7. The Complaint also alleges that on or about April, 1996, [Ponani] and [Sara] breached the oral contract by refusing to make payments on the alleged contract.
>
> "8. [Ponani] and [Sara] were married on October 18, 1970, and were separated in February 1995.
>
> "9. [Sara] was at all times aware of any and all monies received from . . . Lee and consented to the use of monies loaned by . . . Lee for the Sukumar[s'] living expenses, including payments on the mortgage of the family residence.
>
> "10. The alleged oral contract was personally entered into by [Ponani], [Sara] and . . . Lee."

Following the evidentiary portion of the jury trial, the trial court granted Ponani's motion for nonsuit, finding, as a matter of law, he had probable cause to file his cross-complaint for indemnity against Sara. The court noted that, although his cross-complaint contained factual allegations in two paragraphs (i.e., paragraphs 9 and 10) he arguably knew were false, those allegations were unnecessary to his indemnity claim based on the other eight paragraphs of that cause of action (i.e., paragraphs 1 through 8). It concluded Ponani had probable cause to file his cross-complaint irrespective of any jury finding regarding his knowledge of the falsity of the factual allegations in those two paragraphs.

B

Sara argues the trial court erred by granting Ponani's motion for nonsuit because there were disputed factual issues regarding his knowledge that should have been decided by the jury and could have shown he did not have probable cause to file his cross-complaint against her for indemnity and declaratory relief. She argues that if Ponani knew his claim of loans from Lee or the other allegations in his cross-complaint were false at the time he filed and prosecuted his cross-complaint against her, he could not have probable cause for his cross-complaint.

However, as Ponani asserts, assuming arguendo that factual question was presented to the jury and decided adversely to him, he nevertheless would have had probable cause to file and prosecute his cross-complaint against Sara for indemnity and declaratory relief. Lee filed a breach of contract action against Ponani and Sara arising out of the alleged loans he made to them. Ponani and Sara filed cross-complaints for indemnity against each other. Ponani's cross-complaint sought indemnity against Sara for one-half of the marital community's obligation to pay whatever judgment Lee might obtain against them. Had Lee somehow prevailed in his breach of contract action against Ponani and Sara, Ponani would have been liable for their marital community's debt and his indemnification cause of action was, in effect, a "protective" claim against Sara in the event Lee's action were successful. Therefore, even had Ponani subjectively known Lee's loan claims were false and his (Ponani's) cross-complaint allegations that Sara knew of and agreed to those loans were false, Ponani nevertheless was subject to potential liability based on the possibility that Lee might prevail in his action against Sara and him. Had Lee so prevailed, Ponani's claim for indemnity to require Sara to share in the payment of that marital community debt potentially would have had merit. Accordingly, a reasonable attorney could believe Ponani's cross-complaint against Sara for indemnity was legally tenable, despite his factual knowledge that the underlying loan claims were false.

As Ponani notes, a question of disputed fact for jury determination exists only when the determination of probable cause depends on the defendant's factual knowledge at the time of filing and prosecution of the underlying action (e.g., cross-complaint). (*Sheldon Appel*, *supra*, 47 Cal.3d at p. 881; *Sangster v. Paetkau*, *supra*, 68 Cal.App.4th at p. 165.) Contrary to Sara's assertion, "the fact there may be *some* disputed facts relevant to the merits of the underlying action does not by itself" necessarily require a jury determination of those disputed facts. (*Sangster*, at p. 167.) "If undisputed facts in the record do establish an objectively reasonable basis for bringing the underlying action, the existence of other, allegedly disputed facts is immaterial. [Citation.]" (*Ibid*.) That is precisely the situation we have in this case. Because the undisputed facts show Ponani was potentially liable for any judgment Lee might obtain in his breach of contract action against Sara and him, Ponani had an objectively reasonable basis for filing and prosecuting his cross-complaint against Sara for indemnification regardless of alleged disputed facts regarding Ponani's knowledge that Lee's alleged loan claims and his (Ponani's) allegation that Sara knew of and agreed to those alleged loans were false. Therefore, those disputed facts were irrelevant to the trial court's determination that Ponani had probable cause to file and prosecute his cross-complaint against Sara for indemnity and declaratory relief. Because the factual predicates to Ponani's indemnification claim were undisputed, the trial court correctly concluded, as a matter of law, he had probable cause to file and prosecute his cross-complaint.[15]

The cases cited by Sara are inapposite to the circumstances in this case and do not persuade us to conclude otherwise. (See, e.g., *Sierra Club, supra*, 72 Cal.App.4th 1135; *Camarena v. Sequoia Ins. Co.* (1987) 190 Cal.App.3d 1089; *George F. Hillenbrand, Inc. v. Insurance Co. of North America* (2002) 104 Cal.App.4th 784.) Furthermore, although she argues affirmance of the judgment for Ponani in this case would be contrary to public policy and essentially preclude any malicious prosecution action against any cross-complainant for indemnity or declaratory relief, we do not view our conclusion in this

15 Paragraphs 9 and 10 of Ponani's cross-complaint, as quoted above, were not necessary factual predicates, or otherwise relevant, to his indemnification claim.

case as applying to all cross-complaints (or complaints) for indemnification. Rather, we decide only the issue of probable cause in the circumstances of this case. We do not doubt that in other cases or circumstances there may be threshold factual questions necessary for jury determination whether there is probable cause for filing and prosecution of a claim for indemnification.

Finally, Sara argues our prior decision in the SLAPP appeal in this case, *Sukumar v. Sukumar*, *supra*, D043538, precludes our conclusion that Ponani had probable cause to file and prosecute his cross-complaint against Sara for indemnity. She relies on the following language in a footnote to our opinion:

> "[Sara's] factual theory is that [Ponani] and Lee agreed to a scheme whereby funds they knew to be gifts or payments would be recharacterized as loans, which would then support a lawsuit against [Sara] that would pressure her into concessions in the marital dissolution proceedings and/or financially ruin her. If the trier of fact finds [Ponani] and Lee *did* agree to that scheme, [Ponani] would not have probable cause to seek indemnity by his cross-complaint because he knew [Sara] had no liability ab initio." (*Id*. at p. 12, fn. 8.)

However, at the time of that opinion, Sara's malicious prosecution theory was that Lee and Ponani conspired to lie about the purported loans and to financially ruin her by means of Lee's breach of contract action (e.g., Ponani collaborated in the filing of Lee's underlying action while knowing its claims were false). Her theory was *not* based on Ponani's filing of his cross-complaint against her. However, at trial she abandoned her original malicious prosecution theory of liability against Ponani for his participation in the filing of Lee's action and relied solely on Ponani's filing of his own cross-complaint for indemnity. Therefore, our comment in the SLAPP opinion regarding probable cause does not apply to Sara's trial theory for Ponani's liability for malicious prosecution. In any event, were our language to be construed as applying to the circumstances in the instant appeal, we deem that language to be dictum and we decline to follow it.

DISPOSITION

The judgments are affirmed. The parties shall bear their own costs on appeal.

McDONALD, J.

WE CONCUR:

BENKE, Acting P. J.

IRION, J.